

**立法會**  
**Legislative Council**

Ref : CB2/PS/4/04

LC Paper No. CB(2)1439/04-05  
(These minutes have been seen by  
the Administration)

**Subcommittee on  
Review of Existing Statutory Provisions  
on Search and Seizure of Journalistic Material**

**Minutes of meeting  
held on Tuesday, 8 March 2005 at 4:30 pm  
in Conference Room B of the Legislative Council Building**

**Members present** : Hon James TO Kun-sun (Chairman)  
Hon Margaret NG  
Hon WONG Yung-kan, JP  
Hon Howard YOUNG, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP

**Members absent** : Hon Albert HO Chun-yan  
Dr Hon LUI Ming-wah, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Daniel LAM Wai-keung, BBS, JP

**Public Officers attending** : Ms Winnie NG  
Principal Assistant Secretary for Security E

Mr Kevin ZERVOS, SC  
Senior Assistant Director of Public Prosecutions  
Department of Justice

Mr Philip WONG  
Chief Superintendent of Police (Crime Headquarters) (Crime)

Mr Michael John BISHOP  
Assistant Director/Operations 4  
Independent Commission Against Corruption

**Clerk in attendance** : Mrs Sharon TONG  
Chief Council Secretary (2)1

**Staff in attendance** : Mr LEE Yu-sung  
Senior Assistant Legal Adviser 1

Mr Raymond LAM  
Senior Council Secretary (2)5

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**I. Election of Chairman**

Mr James TO was elected Chairman of the Subcommittee.

**II. Proposed terms of reference of the Subcommittee**

(LC Paper No. CB(2)1010/04-05(02))

2. Members agreed on the proposed terms of reference of the Subcommittee. Members noted that the proposed terms of reference would be submitted to the Panel on Security for endorsement.

**III. Meeting with the Administration**

(LC Paper Nos. CB(2)689/04-05(03) and CB(2)992/04-05(01))

3. At the invitation of the Chairman, Principal Assistant Secretary for Security E (PAS(S)E) briefed members on the background of the enactment of the statutory provisions in Part XII of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1) and highlighted the following –

- (a) the protection provided under Part XII of IGCO was applicable to journalistic material only;
- (b) law enforcement agencies had seldom exercised the powers of search and seizure under Part XII of IGCO after it came into operation in 1996;
- (c) the final decision of whether a search warrant or a production order should be issued did not rest with law enforcement agencies but the court; and
- (d) the present legislative scheme on law enforcement agencies' access to

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journalistic material had struck an appropriate balance between protection of press freedom and public interest. The Administration did not consider it necessary to amend Part XII of IGCO at this stage.

4. Mr Howard YOUNG asked whether there were grey areas in the definition of journalistic material as a result of technological development, such as that in computers and CD-ROMs, in the past ten years.

5. PAS(S)E responded that information stored in a computer was dealt with under section 88 of IGCO.

6. The Chairman said that journalistic material was generally interpreted as material produced by journalists. He asked whether the following situations would fall within the meaning of journalistic material under existing legislation –

- (a) material created and sent through electronic mail or third generation mobile telephone by a member of the public; and
- (b) material created and disseminated by students through the internal radio channels of tertiary education institutes.

7. PAS(S)E responded that the meaning of journalistic material as provided in section 82 of IGCO was very broad. It was focussed on the material itself rather than the persons who created the journalistic material. Referring to paragraph 15 of the report of the Bills Committee on Interpretation and General Clauses (Amendment) Bill 1995, she said that the provisions were focused on the journalistic material rather than the person who created the material.

8. Senior Assistant Director of Public Prosecutions, Department of Justice (SADPP) said that the definition of journalistic material in section 82 of IGCO was the same as that in the Police and Criminal Evidence Act 1984 (PACE) of the United Kingdom (UK). However, the safeguard provided under PACE was confined to journalistic material obtained or held in confidence. The definition adopted in IGCO had a broader scope. There had been views that the existing definition of journalistic material was too broad that it might encompass other material to which law enforcement agencies should be given access for the investigation of crime.

9. The Chairman said that much information was created by persons other than journalists and disseminated through the Internet or third generation mobile telephones. He requested the Administration to provide information on court cases in common law jurisdictions relating to the definition of journalistic material.

10. SADPP agreed to provide a written response. He said that the relevant local cases were related to journalistic material in the possession of journalists. To his knowledge, the relevant cases in UK were related to material created by journalists or a

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photographer attached to a media organisation.

11. Miss Margaret NG said that although the powers of search and seizure under Part XII of IGCO had seldom been exercised, it could be noted from the cases where such powers had been exercised that there were grey areas in existing legislation. Although the provisions were intended for the protection of press freedom, the Court of First Instance (CFI) and the Court of Appeal (C of A) held different views on the powers concerned. She asked whether the Administration would consider providing in legislation “a real risk that journalistic material may be hidden or destroyed” put forward in the judgment of CFI as the test for the issue of warrants to search journalistic material.

12. PAS(S)E responded that the Administration had considered the suggestion and come to the conclusion that there was not a need to incorporate the element of “real risk”. Taken in its entirety, the existing scheme had already allowed the court to take all relevant factors into account. The consideration of a real risk that journalistic material might be hidden or destroyed was already covered in the consideration of factors that might seriously prejudice the investigation. She stressed that public interest was the ultimate consideration of the court.

13. Miss Margaret NG said that if the element of giving consideration to whether there was such a real risk had already been encompassed in existing legislation, the Administration should have no objection to making it explicit.

14. PAS(S)E reiterated that the Administration did not consider that there was a need to expressly provide for a separate element of “real risk” in existing legislation. The existing scheme had already provided for the court to take all relevant factors into account.

15. SADPP said that CFI’s view regarding the element of real risk had been dealt with in the judgment delivered by C of A. He pointed out that the real risk that journalistic material might be destroyed was only one of the situations where serious prejudice to investigation might arise, which was dealt with under section 85 of IGCO.

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16. Miss Margaret NG requested the Administration to consider providing in legislation “a real risk that journalistic material may be hidden or destroyed” put forward in the judgment of CFI as the test for the issue of warrants to search journalistic material. She considered that if the Administration decided not to do so, it should explain the justifications for not doing so.

17. Miss Margaret NG said that representatives of the Administration should comprise a representative from the Legal Policy Division of the Department of Justice (D of J). The Chairman added that such a representative could provide advice on human rights implications and matters relating to legal policy. PAS(S)E noted the views of members.

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18. Referring to section 85(7) of IGCO, the Chairman asked whether a judge was obliged to consider public interest in determining whether an application for immediate access to the material seized should be allowed.

19. PAS(S)E responded that section 89(2) of IGCO provided that nothing in Part XII of IGCO should be construed as requiring a judge to make an order where it would not be in the public interest to do so. Therefore, section 85(7) was subject to section 89(2). Her view was shared by SADPP. In response to the Chairman, Senior Assistant Legal Adviser 1 (SALA1) said that section 89(2) applied to Part XII of IGCO.

20. Ms Audrey EU said that section 85(6) of IGCO only referred to a warrant, which was different from an order referred to in section 89(2) of IGCO.

21. SADPP responded that a warrant was an order to issue a warrant. The Chairman requested the Administration to provide a written response explaining whether section 89(2) of IGCO applied to section 85(6) and (7) of IGCO. He also requested the Administration and SALA1 to study the judgments delivered by CFI and C of A and examine whether the courts construed that section 89(2) was applicable to any warrant issued under Part XII of IGCO.

22. Ms Audrey EU asked whether the Administration would consider the suggestion of establishing a mechanism for dealing with appeals relating to search warrants issued under Part XII of IGCO.

23. SADPP responded that the suggestion had to be considered carefully, as it would be inappropriate to deal with criminal matters through civil rules. Ms Audrey EU considered that the establishment of a mechanism for appeal should be further discussed at a future meeting.

24. Referring to section 85(5)(c) of IGCO, Ms Audrey EU asked about the factors that might give rise to the situation where the serving of notice of application for a production order might seriously prejudice the investigation concerned.

25. SADPP responded that the factors giving rise to such a situation varied from one case to another. He stressed that section 85(5)(c) of IGCO required the judge to be satisfied that the production order route was not viable because the issue of such an order might seriously prejudice investigation through people being tipped off or unintentionally told of the investigation being undertaken.

26. Ms Audrey EU considered that the criteria for determining whether an investigation would be seriously prejudiced should be set out clearly in legislation. She said that although the Administration had stressed that the final decision of whether a search warrant should be issued rested with the court, different judges might

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hold different views. It could be noted from the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* that CFI had given consideration to whether there was a real risk that journalistic material would be destroyed, whereas C of A had given consideration to the real possibility that had a production order been made, there was nothing in the relevant statutory provisions to prevent a journalist from revealing this fact or the information used to support it. She questioned whether law enforcement agencies would apply for a Tier One production order in practice, as they generally anticipated that media organisations would not comply with a production order.

27. SADPP said that a Tier One production order might be needed in cases where the media organisation concerned was willing to provide the requested information if the law enforcement agency concerned to produce the relevant court order, or where the journalistic material to be seized was already made public.

28. PAS(S)E stressed that it would eventually be the court which determined whether a Tier One production order, a Tier Two warrant (i.e. warrant application, seize and seal) or a Tier Three warrant (i.e. warrant application, seize and use) should be issued in a case. She informed members that the Police had applied for a Tier One production order and a Tier Two warrant in the past.

29. Chief Superintendent of Police (Crime Headquarters)(Crime) explained that in the case concerned, the Police had, in accordance with its guidelines, sent a letter to a media organisation by registered mail requesting the provision of certain journalistic material but received no response. The Police then applied to the court for a production order. The media organisation concerned did not attend the relevant *inter partes* hearing, nor did it comply with the production order. The media organisation only replied in a subsequent letter that the journalist concerned was no longer employed by the media organisation.

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30. The Chairman and Miss Margaret NG requested the Administration to explain the criteria adopted for satisfying the test of “seriously prejudice the investigation” in section 85(5)(c) of IGCO. Miss Margaret NG also requested the Administration to provide the Police’s guidelines on search and seizure of journalistic material, and advise on any inadequacies in the guidelines in terms of enforcement.

31. Ms Audrey EU asked about the differences between the conditions under which a production order or a search warrant would be issued.

32. PAS(S)E explained that the conditions for the issue of a production order, which were set out in section 84 of IGCO, could be summarised as follows –

- (a) there were reasonable grounds to believe that an arrestable offence had been committed;
- (b) the material sought was likely to be of substantial value to the

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investigation of the offence;

- (c) other methods of obtaining the material had been tried and failed, or had not been tried because of the likelihood of failure or serious prejudice to the investigation; and
- (d) there were reasonable grounds to believe that it was in the public interest to grant the order, having regard to the benefit likely to accrue to the investigation.

33. Regarding the issue of a search warrant, PAS(S)E explained that the law provided for two possible routes. The first route was to satisfy the judge that a Tier One production order had not been complied with. The second route was to satisfy the judge that -

- (a) there were reasonable grounds to believe that an arrestable offence had been committed;
- (b) the material sought was likely to be of substantial value to the investigation of the offence;
- (c) other methods of obtaining the material had been tried and failed, or had not been tried because of the likelihood of failure or serious prejudice to the investigation;
- (d) there were reasonable grounds to believe that it was in the public interest to grant the order, having regard to the benefit likely to accrue to the investigation; and
- (e) one of the conditions in section 85(5)(a), (b), or (c) was satisfied.

34. Referring to section 85(2) of IGCO, PAS(S)E informed members that an application for a search warrant should not be made unless it had been approved personally by a directorate disciplined officer of the Police, the Independent Commission Against Corruption, the Immigration Department or the Customs and Excise Department.

35. Ms Audrey EU considered that the condition that the issue of a production order might seriously prejudice investigation could be easily met. She said that the Administration should consider whether “real possibility” or “real risk” should be adopted as the test for whether investigation might be seriously prejudiced. The Chairman expressed concern that the judgment delivered by C of A had made it easy to satisfy the condition that an investigation might be seriously prejudiced, as the law enforcement agency concerned only needed to satisfy the judge that the issue of a production order might result in people being tipped off or unintentionally told of the

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investigation being undertaken.

36. SADPP said that the ultimate test was whether the issue of a production order might seriously prejudice investigation. The law enforcement agency concerned would have to satisfy the judge that the issue of such an order might seriously prejudice investigation.

37. Ms Audrey EU considered that there was not much difference between warrants issued under Tier Two and Tier Three.

38. SADPP responded that although there was not much difference between warrants issued under the two tiers, a Tier Three warrant might be needed in a murder case where there was an urgent need to use the journalistic material seized. The Chairman said that a Tier Three warrant might be needed in cases where there was an urgent need to use the journalistic material seized for the rescue of hostages held by terrorists.

39. The Chairman said that many media organisations had expressed the view that although journalistic material seized under a Tier Two warrant was to be sealed, the law enforcement officers concerned would have already read the journalistic material when screening journalistic material that was relevant for seizure and seal.

40. SADPP responded that the person from whom the material was seized might make an *inter partes* application under section 87 of IGCO for the return of the seized material. He pointed out that such a channel was not provided for in the relevant UK legislation.

41. The Chairman asked whether it would be easy to satisfy one of the conditions in section 85(5) of IGCO, if the public interest test in section 84(3)(d) of IGCO had been met.

42. SADPP responded that section 84(3)(d) referred to situations where an application was made for a production order, whereas section 85(5)(c) referred to situations where the service of notice of an application for a production order might seriously prejudice investigation. When a production order route was not viable, an application for search warrant would be made.

Clerk

43. Members asked the Secretariat –

- (a) to re-issue the relevant papers and submissions for the meetings of the Panel on Security on 2 and 29 November 2004; and
- (b) to re-circulate relevant information and deliberations of the Bills Committee on Interpretation and General Clauses (Amendment) Bill 1995.

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44. Members agreed that the Law Society of Hong Kong and the Hong Kong Bar Association should be invited to submit views on the existing statutory provisions on search and seizure of journalistic material.

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45. The Chairman requested the Administration to research into court cases on application for Mareva Injunction and provide a summary of the cases highlighting how the test of “real risk” was applied.

**IV. Date of next meeting**

46. Members agreed that the next meeting would be scheduled, pending the availability of the information to be provided by the Administration.

47. The meeting ended at 6:30 pm.

Council Business Division 2  
Legislative Council Secretariat  
3 May 2005